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No. 82-424

In the Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MASCALI CONSTRUCTION G.C.P. CO. AND FRANK MASCALI CONSTRUCTION CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that Local 282, International Brotherhood of Teamsters ("the Union") violated the National Labor Relations Act ("the Act") by, *inter alia*, refusing to refer two employee dissidents, Charles Kurd and John Kuebler, for employment and ultimately securing their discharge from Willets Point Contracting Corporation ("Willets") (Pet. App. 221a, 165a, 61a-89a).[1] The Board further found that petitioners violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by accepting and

[1]The Union has filed a petition for a writ of certiorari (No. 82-94) contesting the Board's finding that it unlawfully secured Kurd's and Kuebler's discharges. Petitioners have not included the opinions of the Board or the court of appeals in the appendix to the instant petition; instead, they have referred to the appendix to the petition in No. 82-94. Accordingly, Pet. App. references herein are to the appendix in No. 82-94.

condoning a referral arrangement with the Union that discriminated against the dissident employees (Pet. App. 221a-223a, 127a). The relevant facts are as follows:

Petitioners obtained a contract to repair the Grand Central Parkway on Long Island, New York[2] (Pet. App. 47a). Petitioners did not have sufficient men or equipment to handle the job and therefore decided to hire additional personnel and equipment from other companies (*id.* at 47a-48a). Petitioners, who had a collective bargaining relationship with the Union, agreed to the request of the Union's business agent that when it needed additional drivers it would first call the Union's shop steward at Willets Point Contracting Corporation, Robert Worhacz (*id.* at 48a-50a).

On September 1, 1977, several months after the inception of the job referral arrangement with the Union, petitioners' job superintendent, Paternostro, called Worhacz to obtain additional drivers for the next day. Worhacz was unable to supply enough drivers and Paternostro, having turned to other sources, hired Kuebler at the suggestion of a source independent of the Union (Pet. App. 110a-111a). On September 2, Paternostro talked to Worhacz and informed him of Kuebler's hire. Worhacz informed Paternostro that he had enough drivers to send petitioners for the next working day and Kuebler should return to "shape" at Willets[3] (*id.* at 113a-115a). The next workday, September 6, Paternostro called Worhacz and obtained all the needed drivers. When Kuebler appeared at the jobsite and saw another Willets

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[2]Petitioner Frank Mascali Construction Co., Inc., established petitioner Frank Mascali Construction G.C.P. as a separate corporation to do the Parkway job (Pet. App. 48a). They are referred to collectively herein.

[3]Under the shape system, a company's drivers were required to appear at a designated place for job assignments, which were based primarily on seniority (Pet. App. 19a-20a).

driver there, he asked Paternostro why he had not been assigned to the truck. Paternostro explained the arrangement with the Union and said that he could not put Kuebler to work ahead of the drivers referred from Willets and that there was nothing he could do (*id.* at 115a). Thereafter, Kuebler attempted to obtain further employment with petitioners and explained his problems in obtaining referrals through Worhacz (*id.* at 123a-124a). His efforts were unsuccessful.

2. In finding that petitioners violated the Act by accepting and condoning the Union's discriminatory referral system, the Board acknowledged that, prior to September 2, 1977, petitioners had no knowledge of the Union's referral discrimination (Pet. App. 124a-126a). However, the Board concluded that, after Worhacz's September 2 conversation with Paternostro and Kuebler's subsequent conversations with petitioners' managerial personnel, petitioners "should have known, or make [sic] inquiries about, the discriminatory manipulation of the referral system and the shape system at Willets Point on and after September 2, 1977" (*id.* at 127a). The Board added (*id.* at 222a-223a) that, even if petitioners had "no actual knowledge of the Union's discrimination," it would bear responsibility because it delegated its hiring responsibilities to the Union.

The Board found that, but for the discriminatory administration of the referral system, both Kuebler and Kurd might have obtained work on petitioners' project (Pet. App. 224a-225a). However, the Board concluded that the Union, because of its greater responsibility, should be primarily liable, and petitioners only secondarily liable, for any backpay due Kuebler and Kurd due to discriminatory referrals[4] (*id.* at 223a-224a).

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[4]The Board dismissed the allegation that petitioners' failure to employ Kuebler as a permanent employee was unlawful (Pet. App. 214a-221a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-6a). The court explained (*id.* at 5a-6a):

> Mascali contends that it lacked knowledge of any discriminatory practices committed by the Union in connection with work referrals of the Willets employees. We and other courts have indicated that employees [sic] may be found to have violated Section 8(a)(3) if they delegate to unions the authority to supply workers, and the unions do so in a discriminatory manner, even if the employer is unaware of the discrimination. *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914, 917 (2d Cir. 1960), cert. denied, 366 U.S. 909 (1961); *Pacific Maritime Ass'n* v. *NLRB*, 452 F. 2d 8, 10 (9th Cir. 1971). We need not rest on this principle, however, since the ALJ found, upon adequate evidence of conversations of Worhacz and Kuebler with Mascali personnel, that Mascali should have known, or made inquiries about, the Union's discriminatory manipulation of the referral system, at least by September 2, 1977.

4. Petitioners contend (Pet. 7-9), in reliance on *General Building Contractors Association* v. *Pennsylvania*, No. 81-280 (June 29, 1982), that the Board erred in concluding that an employer who delegates hiring responsibility to a union may be held liable for the union's discrimination, even if the employer is unaware of the discrimination.[5] There is no necessity for the Court to reach that question here, however, for the Board, upheld by the court of

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[5] In *General Building Contractors*, the Court held that liability under 42 U.S.C. 1981, for racial discrimination in the operation by a union of an exclusive hiring hall, could not be imposed on employers obtaining employees from the hall without proof of intentional discrimination by the employers.

appeals, alternatively held that petitioners should have known, or made inquiries, about the Union's discriminatory administration of the referral system.[6] Resolution of that fact-bound question raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[7]

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[6]Petitioners also contend (Pet. 12-14) that they should not be held liable for the Union's discrimination merely because they should have known, or made inquiries, about the discriminatory administration, but that actual knowledge is required for liability. The cases cited by petitioners (Pet. 13-14) do not support that assertion. Thus, in *Pacific Maritime Association* v. *NLRB*, 452 F. 2d 8, 10 (9th Cir. 1971), the court held that there was sufficient evidence of employer knowledge where there were facts which "should have put [it] on notice" (citing *NLRB* v. *Houston Maritime Association*, 337 F. 2d 333, 336 (5th Cir. 1964)). Accord, *NLRB* v. *Master Stevedores Association*, 418 F. 2d 140, 142 (5th Cir. 1969) (employers are responsible for discriminatory acts of union "where they know or reasonably should know of the discriminatory acts"); *Lummus Co.* v. *NLRB*, 339 F. 2d 728, 737 (D.C. Cir. 1964) (employer is liable where it "may reasonably be charged with notice"). In *Fruin-Colnon Corp.* v. *NLRB*, 571 F. 2d 1017, 1020 (8th Cir. 1978) the court upheld the Board's finding that the employer was responsible for the union's discrimination where it "had sufficient knowledge, which any reasonable employer would have exercised, to question [the union's termination decisions]." In *NLRB* v. *American Postal Workers Union*, 618 F. 2d 1249, 1261 (8th Cir. 1980), the court found the employer not responsible for the union's discrimination because "[t]he only reasonable conclusion from the evidence" was that the employer thought it was required by the collective agreement to accede to the union's demand. *NLRB* v. *Mallory & Co.*, 237 F. 2d 437, 442-444 (7th Cir. 1956), does not involve the issue of employer responsibility for union discrimination since the court found that the union had not acted discriminatorily and went on to decide whether the employer independently acted unlawfully. Similarly, in *NLRB* v. *Shen-Valley Meat Packers, Inc.*, 211 F. 2d 289, 292-293 (4th Cir. 1954), the court found that neither the union nor the employer had acted discriminatorily.

[7]Petitioners also challenge (Pet. 14-18) the substantiality of the evidence to support the finding that it delegated hiring authority to the Union. That question too raises only evidentiary issues.

Petitioners also challenge (Pet. 19-20) the Board's order making them secondarily liable for any backpay to which Kuebler and Kurd might be entitled because of discriminatory referrals.[8] In so contending, petitioners simply reassert their argument that they can not be held liable for the discrimination merely because they should have known or made inquiries about the discriminatory referral practice but are liable only if they actually were aware of it. As shown (see note 6, *supra*), the courts have uniformly held employers liable for discriminatory employment practices of unions where the facts known to the employers should have put them on notice about such practices.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[8]The Board's practice is to hold a party only secondarily liable where there are circumstances mitigating its responsibility for the unlawful practice. See, *e.g.*, *Bulletin Co.*, 181 N.L.R.B. 647 & n.3 (citing cases) (1970), enforced, 443 F. 2d 863 (3d Cir. 1971); *J. Willes & Son Masonary*, 191 N.L.R.B. 872, 875 (1971); *Union Bleacher Co.*, 245 N.L.R.B. 719 n.3 (1979). Petitioners do not contest this practice; rather, they maintain that they should not be liable at all for backpay due to discriminatory referrals.